Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

10 November 2022 *

(Appeal – State aid – Public guarantee granted by a public entity – Loans to three football clubs from the Community of Valencia (Valencia CF, Hércules CF and Elche CF) – Decision declaring the aid to be incompatible with the internal market – Annulment of the decision in so far as it concerns Valencia CF – Concept of 'advantage' – Assessment of the existence of an advantage – Guarantee Notice – Interpretation – Duty of care on the part of the European Commission – Burden of proof – Distortion)

Case C-211/20 P

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 22 May 2020,

European Commission, represented by G. Luengo, P. Němečková and B. Stromsky, acting as Agents,

appellant,

the other parties to the proceedings being:

Valencia Club de Fútbol SAD, established in Valencia (Spain), represented by G. Cabrera López, J.R. García-Gallardo Gil-Fournier and D. López Rus, abogados,

applicant at first instance,

Kingdom of Spain, represented by M.J. Ruiz Sánchez, acting as Agent,

intervener at first instance,

THE COURT (First Chamber),

composed of A. Arabadjiev (Rapporteur), President of the Chamber, L. Bay Larsen, Vice-President of the Court, acting as Judge of the First Chamber, P.G. Xuereb, A. Kumin and I. Ziemele, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: Spanish.

after hearing the Opinion of the Advocate General at the sitting on 7 April 2022,

gives the following

Judgment

1 By its appeal, the European Commission seeks to have set aside the judgment of the General Court of the European Union of 12 March 2020, *Valencia Club de Fútbol* v *Commission* (T-732/16, EU:T:2020:98), by which that court annulled Commission Decision (EU) 2017/365 of 4 July 2016 on the State aid SA.36387 (2013/C) (ex 2013/NN) (ex 2013/CP) implemented by Spain for Valencia Club de Fútbol Sociedad Anónima Deportiva, Hércules Club de Fútbol Sociedad Anónima Deportiva and Elche Club de Fútbol Sociedad Anónima Deportiva (OJ 2017 L 55, p. 12) ('the decision at issue'), in so far as it concerns Valencia Club de Fútbol SAD ('Valencia CF').

Legal context

2 Under point 2.2 of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ 2008 C 155, p. 10) ('the Guarantee Notice'):

'Usually, the aid beneficiary is the borrower. As indicated under point 2.1, risk-carrying should normally be remunerated by an appropriate premium. When the borrower does not need to pay the premium, or pays a low premium, it obtains an advantage. Compared to a situation without guarantee, the State guarantee enables the borrower to obtain better financial terms for a loan than those normally available on the financial markets. Typically, with the benefit of the State guarantee, the borrower can obtain lower rates and/or offer less security. In some cases, the borrower would not, without a State guarantee, find a financial institution prepared to lend on any terms. State guarantees may thus facilitate the creation of new business and enable certain undertakings to raise money in order to pursue new activities. Likewise, a State guarantee may help a failing firm remain active instead of being eliminated or restructured, thereby possibly creating distortions of competition.'

3 Point 3.1 of the Guarantee Notice is worded as follows:

'If an individual guarantee or a guarantee scheme entered into by the State does not bring any advantage to an undertaking, it will not constitute State aid.

In this context, in order to determine whether an advantage is being granted through a guarantee or a guarantee scheme, the Court has confirmed … that the Commission should base its assessment on the principle of an investor operating in a market economy … Account should therefore be taken of the effective possibilities for a beneficiary undertaking to obtain equivalent financial resources by having recourse to the capital market. State aid is not involved where a new funding source is made available on conditions which would be acceptable for a private operator under the normal conditions of a market economy …

…'

4 Point 3.2(a) and (d) of that notice states:

'Regarding an individual State guarantee, the Commission considers that the fulfilment of all the following conditions will be sufficient to rule out the presence of State aid.

(a) The borrower is not in financial difficulty.

In order to decide whether the borrower is to be seen as being in financial difficulty, reference should be made to the definition set out in the Community guidelines on State aid for rescuing and restructuring firms in difficulty …

…

(d) A market-oriented price is paid for the guarantee.

As indicated under point 2.1, risk-carrying should normally be remunerated by an appropriate premium on the guaranteed or counter-guaranteed amount. When the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets, the guarantee does not contain aid.

If no corresponding guarantee premium benchmark can be found on the financial markets, the total financial cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, has to be compared to the market price of a similar non-guaranteed loan.

In both cases, in order to determine the corresponding market price, the characteristics of the guarantee and of the underlying loan should be taken into consideration. This includes: the amount and duration of the transaction; the security given by the borrower and other experience affecting the recovery rate evaluation; the probability of default of the borrower due to its financial position, its sector of activity and prospects; as well as other economic conditions. This analysis should notably allow the borrower to be classified by means of a risk rating. This classification may be provided by an internationally recognised rating agency or, where available, by the internal rating used by the bank providing the underlying loan. The Commission points to the link between rating and default rate made by international financial institutions, whose work is also publicly available … To assess whether the premium is in line with the market prices the Member State can carry out a comparison of prices paid by similarly rated undertakings on the market.

The Commission will therefore not accept that the guarantee premium is set at a single rate deemed to correspond to an overall industry standard.'

5 Point 3.6 of that notice provides:

'Failure to comply with any one of the conditions set out in points 3.2 to 3.5 does not mean that the guarantee or guarantee scheme is automatically regarded as State aid. If there is any doubt as to whether a planned guarantee or guarantee scheme constitutes State aid, it should be notified to the Commission.'

6 Point 4.1 of that notice provides:

'Where an individual guarantee or a guarantee scheme does not comply with the market economy investor principle, it is deemed to entail State aid. The State aid element therefore needs to be quantified in order to check whether the aid may be found compatible under a specific State aid

exemption. As a matter of principle, the State aid element will be deemed to be the difference between the appropriate market price of the guarantee provided individually … and the actual price paid for that measure.

…

When calculating the aid element in a guarantee, the Commission will devote special attention to the following elements:

(a) whether in the case of individual guarantees the borrower is in financial difficulty. … (see details in point 3.2(a)).

The Commission notes that for companies in difficulty, a market guarantor, if any, would, at the time the guarantee is granted[,] charge a high premium given the expected rate of default. If the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist and in exceptional circumstances the aid element of the guarantee may turn out to be as high as the amount effectively covered by that guarantee;

…

(d) whether the specific characteristics of the guarantee and loan … have been taken into account when determining the market premium of the guarantee, from which the aid element is calculated by comparing it with the premium actually paid (see details in point 3.2(d)).'

7 Point 4.2 of that notice provides:

'For an individual guarantee the cash grant equivalent of a guarantee should be calculated as the difference between the market price of the guarantee and the price actually paid.

Where the market does not provide guarantees for the type of transaction concerned, no market price for the guarantee is available. In that case, the aid element should be calculated in the same way as the grant equivalent of a soft loan, namely as the difference between the specific market interest rate this company would have borne without the guarantee and the interest rate obtained by means of the State guarantee after any premiums paid have been taken into account. If there is no market interest rate and if the Member State wishes to use the reference rate as a proxy, the Commission stresses that the conditions laid down in the communication on reference rates … are valid to calculate the aid intensity of an individual guarantee. This means that due attention must be paid to the top-up to be added to the base rate in order to take into account the relevant risk profile linked to the operation covered, the undertaking guaranteed and the collaterals provided.'

Background to the dispute and the decision at issue

8 Valencia CF is a professional football club whose head office is located in Valencia, Spain. The Fundación Valencia (Valencia Foundation; 'the FV') is a non-profit foundation whose primary aim is to preserve, disseminate and promote the sporting, cultural and social aspects of Valencia CF and its relationship with its fans.

9 On 5 November 2009, the Instituto Valenciano de Finanzas (Valencian Institute for Finance; 'the IVF'), the financial establishment of the Generalitat Valenciana (Regional Government of Valencia, Spain), provided the FV with a guarantee for a bank loan of EUR 75 million from the bank Bancaja, through which it acquired 70.6% of the shares in Valencia CF ('measure 1').

10 The guarantee covered 100% of the principal of the loan, plus interest and the costs of the guaranteed transaction. In return, an annual guarantee premium of 0.5% had to be paid by the FV to the IVF. The latter received, as a counter-guarantee, a second-rank pledge on the shares in Valencia CF acquired by the FV. The duration of the underlying loan was six years. To begin with, the interest rate of the underlying loan was 6% for the first year, and subsequently the Euro Interbank Offered Rate (Euribor) 1-year + 3.5% margin with a 6% minimum rate. In addition, there was a 1% commitment fee. The schedule provided for repayment of the interest starting in August 2010 and repayment of the principal in two tranches of EUR 37.5 million on 26 August 2014 and 26 August 2015, respectively. It was envisaged that repayment of the guaranteed loan (principal and interest) would be financed by the sale of the shares in Valencia CF acquired by the FV.

11 On 10 November 2010, the IVF increased its guarantee in favour of the FV by EUR 6 million so as to obtain an increase by the same amount in the sum already loaned by Bancaja in order to cover payment of the overdue principal, interest and costs arising from the non-payment of interest on the guaranteed loan on 26 August 2010 ('measure 4').

12 Having been informed of the existence of alleged State aid granted by the Regional Government of Valencia in the form of guarantees on bank loans in favour of Elche Club de Fútbol SAD, Hércules Club de Fútbol SAD and Valencia CF, the Commission, on 8 April 2013, invited the Kingdom of Spain to comment on that information. The latter replied to the Commission on 27 May and 3 June 2013.

13 By letter of 18 December 2013, the Commission informed that Member State of its decision to initiate the formal investigation procedure provided for in Article 108(2) TFEU, in which it invited the interested parties to submit their observations and stated, in particular in recitals 27 to 29 and 51 of that decision:

> '(27) In the present case, the Commission does not know the reference value for the corresponding guarantee fee that can be found on the financial market for guarantees similar to those granted by the IVF. However, the annual guarantee fee of 0.5% for the acquisition of shares in Valencia CF … do[es] not appear, prima facie, to reflect the risk of non-payment of the guaranteed loans, given that Valencia CF … appear[s] to have been in difficulty on the date on which the guarantees in question were granted. …
>
> (28) The Commission also points out that, in addition to having been granted to firms apparently in difficulty, the guarantees cover 100% of the guaranteed amounts. This suggests that market operators are not prepared to take on the risk of the beneficiaries becoming insolvent. The Commission therefore doubts whether the beneficiaries can obtain the guarantees at issue at that price and under those market conditions. Moreover, without the State guarantee, the Commission doubts whether a financial institution would be prepared to grant the beneficiaries a loan on any terms.

(29) Thus, in the light of the foregoing, the Commission considers at this stage that the guarantees granted by the State in 2008, 2010 and 2011 conferred an advantage on the entities which benefited from the loans. …

…

(51) The Commission doubts whether the IVF granted the guarantees at issue in accordance with market criteria, in particular after examining the financial situation and viability prospects of the entities which ultimately benefited from the loans. …'

14 It is apparent from recitals 2 to 5 of the decision at issue that, during the formal investigation procedure, first, the Commission, from 2013 to 2016, received observations, information, further information and further clarifications, in particular from the Kingdom of Spain, the IVF, the FV and Valencia CF and, second, a meeting was held on 29 January 2015 in Brussels with the participation of the Commission services, the Spanish authorities, representatives of the IVF and representatives of Valencia CF.

15 By the decision at issue, the Commission found, inter alia, that measures 1 and 4 constituted unlawful aid incompatible with the internal market, in the amount of EUR 19 193 000 and EUR 1 188 000 respectively, and ordered the Kingdom of Spain to recover that aid immediately and effectively.

16 In Section 7.1 of that decision, entitled 'Existence of State aid', the Commission found, inter alia:

'…

'(77) … already since June 2007 and at the time when measures 1 and 4 were granted, Valencia CF was in difficulty in the sense of point 11 of the 2004 [Rescue and Restructuring] Guidelines …

…

(80) At the same time, the Commission notes that Valencia CF … [was] not in an extreme difficult situation, in the sense of point 2.2 and point 4.1 letter (a) of the … Guarantee Notice, in the years preceding the time when the measures under scrutiny were granted. …

…

(82) … On the basis of the above, the Commission maintains that Valencia CF was in difficulty at the time when measures 1 and 4 were granted.

(83) In conclusion the Commission considers that due to the fact that the three clubs were in financial difficulty at the time before the measures were implemented they can be considered to have a rating in the category of CCC …

…

(85) As regards the aid element in the measures, all of which involve State guarantees, the Commission takes account of the … Guarantee Notice, Sections 2.2 and 3.2. The … Guarantee Notice stipulates that the fulfilment of certain conditions could be sufficient for the Commission to rule out the presence of State aid, such as that the borrower is not in financial difficulty and that the guarantee does not cover more than 80% of the outstanding loan or other financial obligation. However, when the borrower does not pay a risk-carrying price for the guarantee, it obtains an advantage. Moreover, where the borrower is a firm in financial difficulty, it would not find a financial institution prepared to lend on any terms, without a State guarantee.

(86) In this respect, the Commission disagrees with Spain's argument that the conditions of the … Guarantee Notice are fulfilled. Applying these criteria to the case at hand, the Commission finds that:

(a) Valencia CF [was] in financial difficulty (see recitals 70-82 above) at the time of granting of measures 1 … and 4.

…

(c) The annual guarantee premiums of 0.5%-1% charged for the guarantees in question cannot be considered as reflecting the risk of default for the guaranteed loans, given the difficulties of Valencia CF … and in particular [its] high debt-to-equity ratio or the fact that [it] had negative equity at the time of the measures in question.

(87) On the basis of the above, the Commission concludes that measures 1 … and 4 do not respect the conditions set out in the … Guarantee Notice and therefore comes to the view that the beneficiaries would not have obtained the measures under the same terms on the market and hence that these measures conferred an undue advantage to the beneficiaries.

…'

17 In Section 7.2 of that decision, entitled 'Quantification of the aid', the Commission inter alia considered in recital 93:

'According to Section 4.2 of the … Guarantee Notice, the Commission considers that, for every guarantee, the aid amount is equal to the guarantee's subsidy element, i.e. the amount stemming from the difference between, on the one hand, the interest rate of the loan actually applied thanks to the State guarantee plus the guarantee fee and, on the other hand, the interest rate that would have been applied to a loan without the State guarantee. The Commission notes that due to the limited number of observations of similar transactions on the market, such a benchmark will not provide a meaningful comparison. Therefore the Commission will use the relevant reference rate …, which is 1 000 basis points in view of the three football clubs' difficulties and the very low value of the loans' securities, plus 124-149 basis points as the base rates of Spain at the time of the aid measures. Indeed, each loan was securitised with a pledge on the acquired shares in the clubs. However, the latter were in difficulty, i.e. they were conducting operations resulting in losses, and there was no credible viability plan in place to demonstrate that those operations would turn to producing profits for their shareholders. Therefore those clubs' losses were encompassed in the value of the same clubs' shares, thus the value of those shares as loan security was close to zero.

On the basis of the Commission's calculations, the aid amount in the measures under assessment would be EUR 20.381 million in the case of Valencia CF (EUR 19.193 million under measure 1 plus EUR 1.188 million under measure 4) … The Commission's calculations are as follows:

(a) For measure 1: the applied interest rate of 6.5% is deducted from the applicable market interest rate of 11.45%, i.e. 1 000 basis points for Valencia CF plus 145 basis points as base rate for Spain in November 2009 … The result is multiplied by the loan amount of EUR 75 million and by the loan's actual duration of 5.17 years. The final result equals EUR 19.193 million.

…

(d) For measure 4: the applied interest rate of 6.5% is deducted from the applicable market interest rate of 11.45%, i.e. 1 000 basis points for Valencia CF plus 145 basis points [as] base rate for Spain in November 2010 … The result is multiplied by the loan amount of EUR 6 million and by the remainder of the loan's actual duration, equal to 4 years. The final result equals EUR 1.188 million.'

The procedure before the General Court and the judgment under appeal

18 By application lodged with the Court Registry on 20 October 2016, Valencia CF brought an action for annulment of the decision at issue.

19 In support of that action, Valencia CF raised eight pleas in law, the first and third of which alleged, respectively, manifest errors of assessment in the characterisation of an advantage and in the calculation of the amount of the aid.

20 By the judgment under appeal, the General Court upheld the first and third pleas in law and consequently annulled the decision at issue in respect of measures 1 and 4.

Forms of order sought by the parties

21 The Commission claims that the Court should:

– set aside the judgment under appeal so far as concerns measure 1;

– refer the case back to the General Court; and

– reserve the costs.

22 Valencia CF and the Kingdom of Spain contend that the Court should dismiss the appeal and order the Commission to pay the costs.

The appeal

23 In support of its appeal, the Commission raises a single ground alleging a misinterpretation, in paragraphs 124 to 138 of the judgment under appeal, of the concept of 'economic advantage', for the purposes of Article 107(1) TFEU, resulting, first of all, from erroneous interpretations of the decision at issue and of the Guarantee Notice, next, from a failure to observe the limits of its burden of proof and its duty of care, and, lastly, from a distortion of the facts.

24 Valencia CF disputes, inter alia, the admissibility of that appeal.

Admissibility

Arguments of the parties

25 Valencia CF submits, first, that, apart from the general reference to paragraphs 124 to 138 of the judgment under appeal, the Commission does not identify with the requisite precision the paragraphs of that judgment which it disputes.

26 Secondly, according to Valencia CF, the Commission merely repeats its own pleas in law and arguments already put forward before the General Court concerning the obligation to state reasons by which it is bound, so that it seeks only to have the action re-examined by proposing a new assessment of the facts.

27 Thirdly, Valencia CF submits that the Guarantee Notice is not an instrument of positive EU law, so that any infringement of that notice cannot be classified as a 'point of law' within the meaning of Article 58 of the Statute of the Court of Justice of the European Union, which it could then examine in the context of an appeal.

28 The Commission disputes that argument.

Findings of the Court

29 It follows from Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) and Article 169 of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment or order which the appellant seeks to have set aside and the legal arguments specifically advanced in support of the appeal. According to the settled case-law of the Court of Justice, that requirement is not satisfied by an appeal which confines itself to reproducing the pleas in law and arguments previously submitted to the General Court. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake (judgment of 24 March 2022, *Hermann Albers* v *Commission*, C-656/20 P, not published, EU:C:2022:222, paragraph 35 and the case-law cited).

30 In the present case, first, contrary to what Valencia CF claims, the Commission indicated precisely the contested elements of the judgment under appeal and the legal arguments specifically advanced in support of its request to have that judgment set aside.

31 Secondly, the Commission, moreover, does not merely reproduce the pleas in law and arguments previously submitted to the General Court, but specifically challenges the interpretation or application of EU law by the General Court.

32 In that regard, it should be recalled that, provided that the appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base its appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (judgment of 24 March 2022, *Hermann Albers* v *Commission*, C-656/20 P, not published, EU:C:2022:222, paragraph 36 and the case-law cited).

33 Thirdly, contrary to what Valencia CF claims, the question whether the General Court erred in law when it reviewed whether or not the Commission complied with the Guarantee Notice is capable of raising points of law within the meaning of Article 58 of the Statute of the Court of Justice of the European Union, which the Court may then examine in the context of an appeal.

34 It is settled case-law that the examination which the Commission must carry out when applying the private operator principle requires a complex economic assessment (judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 116 and the case-law cited), in which that institution has a broad discretion (see, to that effect, judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 46 and the case-law cited).

35 In accordance with settled case-law, in adopting such guidelines and announcing, by publishing them, that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of that discretion and cannot, as a general rule, depart from those guidelines, at the risk of being found to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (judgments of 2 December 2010, *Holland Malt* v *Commission*, C-464/09 P, EU:C:2010:733, paragraph 46, and of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others* v *Commission*, C-817/18 P, EU:C:2020:637, paragraph 100 and the case-law cited).

36 Therefore, in the area of State aid, the Commission is bound by the guidelines which it issues, to the extent that they do not depart from the rules in the TFEU and to the extent that their application is not in breach of general principles of law, such as equal treatment (judgment of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland and Others* v *Commission*, C-817/18 P, EU:C:2020:637, paragraph 101 and the case-law cited).

37 As is apparent in particular from points 3.1 and 4.1 of the Guarantee Notice, that notice contains rules of conduct announced by the Commission relating, inter alia, to the exercise of its discretion when it carries out complex economic assessments in accordance with the private operator principle.

38 It follows that the appeal is admissible in its entirety.

Substance

Arguments of the parties

39 In the first place, the Commission submits that the General Court misinterpreted the decision at issue when it held, in paragraph 138 of the judgment under appeal, that that institution considered that there was no market price for the guarantee premium at issue. In recital 93(a) of the decision at issue, it indicated the applicable market interest rate, which it fixed at a value of 11.45% after first analysing the situation of Valencia CF at the date when the guarantee was granted, then finding that the club would be given a category CCC credit rating and, finally, analysing the characteristics of the guarantee in question.

40 In that regard, the General Court's misinterpretation of the decision at issue is based essentially on the findings which it set out in paragraphs 124 to 130 of the judgment under appeal.

41 In particular, in paragraph 124 of the judgment under appeal, the General Court did not take into account, when interpreting recital 85 of the decision at issue, the fact that the Commission mainly called into question the price at which the guarantee was obtained, and not the possibility of obtaining a guarantee or a loan on the market, which is borne out by the subsequent reasoning based on the inadequacy of the price paid. In paragraph 125 of the judgment under appeal, the General Court wrongly held, in view of the content of recital 93(a) of the decision at issue, that the Commission had not indicated the market price in order to evaluate the premium at issue.

42 In paragraph 126 of the judgment under appeal, the General Court, first, drew inferences based on its incorrect assessment in paragraphs 124 and 125 of that judgment, according to which the Commission failed to look for a market price in the light of which to compare the premium in question. Second, it wrongly asserted that the Commission had failed to examine all the relevant characteristics of the guarantee and the underlying loan, in particular the existence of securities provided by the borrower. The Commission relied on those characteristics and sureties in order to determine, in recital 93 of the decision at issue, the market price of the guarantee.

43 In the second place, the Commission claims that the General Court misinterpreted the Guarantee Notice. By holding, in paragraphs 132 to 134 of the judgment under appeal, that the Commission assumed that no financial establishment could have acted as guarantor for a firm in difficulty, that the Guarantee Notice does not provide for any general presumption of that kind and that, consequently, the Commission misapplied that notice and failed in its obligation to carry out an overall assessment taking into account all relevant evidence in the case enabling it to determine whether the applicant would manifestly not have obtained comparable facilities from a private operator, the General Court's reasoning was vitiated by the following errors:

– it wrongly assumed that the Commission ruled out the existence of a market price for a guarantee such as the one examined in the present case;

– it wrongly considered that the use of reference rates was comparable to a presumption, even though the Commission explained in detail that the use of those rates was an integral part of an empirical exercise aimed at establishing an indicator of the market price of the guarantee;

– it misinterpreted the Guarantee Notice as providing for a strict hierarchy for market methods and reference methods, even though that notice does not establish such a hierarchy, and both

those methods are designed to determine the market price of the guarantee and are based on market data;

– it wrongly held that the use of the reference rate entails a failure on the part of the Commission to fulfil its obligation to carry out an overall assessment taking into account all relevant evidence in the case enabling it to determine whether Valencia CF would not have obtained comparable facilities from a private operator, given that that reference rate is applied in connection with a detailed analysis of the situation of the beneficiary undertaking and of the characteristics of the guarantee and underlying loan, an analysis which the General Court also set out in paragraphs 62 to 105 of the judgment under appeal; and

– by the analysis carried out in paragraphs 132 to 134 of the judgment under appeal, the General Court itself infringed the requirements relating to an overall assessment stemming from the case-law, by attributing decisive importance to the search for purely hypothetical and very unlikely transactions, the relevance of which is not obvious in a situation where the overall assessment carried out by the Commission on the basis of key objective factors clearly shows that the guarantee at issue was not granted at a market price.

44 In any event, the Commission contends that, in calculating the reference rate in accordance with point 4.2 of the Guarantee Notice, it determined the market price of the financing transaction in question. Similarly, it carried out an overall assessment of the advantage by taking into account the situation of Valencia CF at the time the guarantee was granted and its category CCC credit rating, as well as the characteristics of the guarantee in question.

45 In the third place, the Commission takes the view that the General Court imposed on it duties of care and an excessive burden of proof when, in paragraphs 131 to 138 of the judgment under appeal, it held that the Commission had not sufficiently investigated whether there was a corresponding guarantee premium benchmark that could be found on the financial markets, had presumed that no financial establishment would act as guarantor for a firm in difficulty and had assumed that there was no market price for a similar non-guaranteed loan. In particular, in paragraph 137 of the judgment under appeal, the General Court wrongly held that the Commission was under an obligation to request from the Member State concerned, or other sources, information relating to the existence of loans similar to the loan underlying the transaction at issue.

46 The Commission states that, in recitals 27 to 29, 50 and 51 of the decision to initiate the procedure, it had stated that Valencia CF was a firm in difficulty, that a number of parameters indicated that the premium paid for the guarantee was not consistent with the market price and that there was no indication that similar transactions existed on the market. It thus expressed its doubts as to the existence of similar guarantees on the financial market which could serve as a reference value and stated that it appeared that market operators were not prepared to assume the risk of the beneficiaries becoming insolvent. In that decision, it also invited the Kingdom of Spain and the interested parties to submit comments in that regard and asked that Member State to provide it with all information relevant to the assessment of the aid.

47 However, in its observations, the FV stated that it did not know whether there were similar guarantees on the market that could serve as a reference for the guarantee premium.

48 Thus, since the Commission set out, in the decision to initiate the procedure, a line of reasoning based on the difficulties of Valencia CF and on the characteristics of the guarantee at issue, and since there was no reason to believe that similar transactions existed on the market, which was confirmed by the interested parties, it discharged its burden of proof. Its duty of care does not mean that it must seek information the existence of which is unlikely or purely hypothetical. A request in the decision to initiate the procedure is sufficient for the Member State and the interested parties to notify it of similar transactions, should any exist.

49 According to the Commission, in principle, a Member State which claims to have behaved like a private operator must examine whether similar transactions existed on the market. The public authorities and the beneficiary of the measure are in a better position than the Commission to ascertain the existence of similar transactions. Moreover, the Commission cannot not be asked to prove a negative. The judgment under appeal thus upsets the delicate balance which results from the formal investigation procedure, and which affects its viability.

50 In addition, the judgment under appeal conflicts with the case-law resulting, in particular, from the judgment of 2 April 1998, *Commission* v *Sytraval and Brink's France* (C-367/95 P, EU:C:1998:154, paragraph 60), according to which the Commission cannot be criticised for not having taken into account any matters of fact or of law which could have been submitted to it during the administrative procedure, but which were not, since the Commission is under no obligation to examine, of its own motion and on the basis of prediction, what information might have been submitted to it. It may rely on a coherent set of factors which appear to be reliable and it has, for the complex assessment of the normal level of a guarantee, a margin of discretion on the basis of the information provided by the interested parties.

51 The Commission submits that the Court of Justice acknowledged, inter alia, in the judgment of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238), that the amount of aid contained in the guarantee at issue in the case giving rise to that judgment had been established on the basis of the assessment of the undertaking's difficulties, without having recourse to any requirement concerning more specific market data.

52 More generally, in terms of demonstrating the existence of the aid, the Commission is obliged to use its specific powers of investigation only when it does not have sufficient evidence to prove the existence of the aid, when it is aware of the existence of an important element that is not in its possession and which could affect its assessment of the existence of the aid, or when it is reasonable to suppose that the information in its possession is incomplete. None of those situations exists in the present case. In particular, contrary to what the General Court suggests in paragraph 136 of the judgment under appeal, the Commission had no reason to suppose that the information at its disposal was fragmentary, and it could take the view that it was in possession of all the relevant necessary information.

53 In the fourth place, the Commission submits that the General Court distorted the facts when it stated, in paragraph 137 of the judgment under appeal, that its investigation into the market conditions and the existence of transactions similar to the guaranteed loan was limited to the doubts expressed in the decision to initiate the procedure and that the Commission did not put forward any other evidence obtained during the administrative procedure to support its findings relating to the insufficient number of comparable transactions. Since the FV addressed, in its observations on the decision to initiate the procedure, the issue of similar guarantees on the market, the Commission also based its conclusions relating to the absence of similar transactions on the market on the relevant information produced by the beneficiary.

54 Valencia CF and the Kingdom of Spain dispute those arguments.

Findings of the Court

55 In the first place, as regards the distortion of the facts allegedly committed by the General Court in paragraph 137 of the judgment under appeal, which must be examined at the outset, it should be pointed out that, where an appellant alleges distortion of the evidence by the General Court, that party must, pursuant to Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court of Justice, indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in that party's view, led to such distortion. In addition, according to settled case-law, that distortion must be obvious from the documents in the Court's file, without any need to carry out a new assessment of the facts and the evidence (judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 94 and the case-law cited).

56 In that regard, it is sufficient to note that, although the Commission states that it also based its findings relating to the absence of a similar transaction on the market on the relevant information produced by the beneficiary, it does not substantiate that assertion with any specific reference, in the decision at issue, to such a consideration.

57 In any event, as the Commission also submits, the FV merely stated that it did not know whether there were similar guarantees on the market, a statement which refers to 'a corresponding guarantee premium benchmark on the financial markets' and not to the existence of 'a market price for a similar non-guaranteed loan', the only one referred to in paragraph 137 of the judgment under appeal.

58 In those circumstances, it cannot be held that paragraph 137 of the judgment under appeal reveals a distortion which is obvious from the documents in the file.

59 In the second place, as regards the alleged misinterpretation, in paragraphs 124 to 126 and 138 of the judgment under appeal, of recitals 85 and 93 of the decision at issue, suffice it to state that that is based on a misreading of the judgment under appeal.

60 It is unequivocally apparent from the General Court's reasoning in paragraphs 124 to 137 of that judgment that the statement, in paragraph 138 of that judgment, that the Commission found 'that there was no market price for a similar non-guaranteed loan' refers exclusively to the Commission's finding, in recital 93 of the decision at issue, that the 'limited number of observations of similar transactions on the market … will not provide a meaningful comparison' 'between, on the one hand, the interest rate of the loan actually applied thanks to the State guarantee plus the guarantee fee and, on the other hand, the interest rate that would have been applied to a loan without the State guarantee' and not on the subsequent reasoning of recital 93 where 'the Commission will use the relevant reference rate' in order to determine the market price for the guarantee premium at issue.

61 In the third place, as regards the General Court's allegedly incorrect interpretation of the Guarantee Notice, it must be stated, first, that the argument that the General Court wrongly assumed that the Commission ruled out the existence of a market price for a guarantee such as that examined in the present case is based on the same misreading of the judgment under appeal referred to in the preceding paragraph.

62 Secondly, the complaint that the General Court wrongly held that the use of reference rates is comparable to a presumption also stems from a misreading of the judgment under appeal. As is apparent from paragraphs 132 to 134 of the judgment under appeal, the General Court did not consider that the use of reference rates is comparable to a presumption; it did, however, point out that the Commission had presumed, disregarding the Guarantee Notice, that no financial institution would act as guarantor for a firm in difficulty.

63 In addition, it held, in paragraphs 135 to 137 of the judgment under appeal, that the Commission's assertion that the 'limited number of observations of similar transactions on the market' did not provide a meaningful comparison between, on the one hand, the interest rate of the loan actually applied thanks to the State guarantee plus the guarantee fee and, on the other hand, the interest rate that would have been applied to a loan without the State guarantee, was not substantiated to the requisite legal standard. Thus, the General Court merely took note, in paragraph 130 of the judgment under appeal, of the Commission's use of the reference rates without in any way describing such use as a 'presumption'.

64 Thirdly, contrary to what the Commission claims, the Guarantee Notice does in fact provide for a hierarchy between the methods to be used to establish and quantify the aid element of a measure.

65 First of all, as the Advocate General observed in points 48 to 55 of his Opinion, the first paragraph of point 3.2(d) of that notice provides that it is for the Commission to verify whether 'risk carrying' is 'remunerated by an appropriate premium on the guaranteed or counter-guaranteed amount', given that, where 'the price paid for the guarantee is at least as high as the corresponding guarantee premium benchmark that can be found on the financial markets, the guarantee does not contain aid'.

66 Next, in accordance with the second paragraph of point 3.2(d), it is only 'if no corresponding guarantee premium benchmark can be found on the financial markets' that 'the total financial cost of the guaranteed loan, including the interest rate of the loan and the guarantee premium, has to be compared to the market price of a similar non-guaranteed loan'.

67 It follows that the first method, referred to in paragraph 65 above, must be verified in the first place and, in the absence of a corresponding guarantee premium on the financial markets, the second method, referred to in the preceding paragraph of that judgment, will have to be used. That hierarchy of methods for establishing the aid element of a measure is corroborated by point 4.2 of the Guarantee Notice, which reaffirms in its first paragraph that, 'for an individual guarantee the cash grant equivalent of a guarantee should be calculated as the difference between the market price of the guarantee and the price actually paid' and states in its second paragraph that it is only in cases where the market does not provide guarantees for the type of transaction concerned, and therefore no market price for the guarantee is available, that it is appropriate to use the second method for quantifying the aid element.

68 That method uses as a basis for comparison, under the second paragraph of point 3.2(d) of that notice, 'the market price of a similar non-guaranteed loan' and, in the equivalent words of the second paragraph of point 4.2 of that notice, 'the specific market interest rate this company would have borne without the guarantee'.

69 Finally, it is apparent from the second paragraph of point 4.2 of the Guarantee Notice that it is only 'if there is no market interest rate and if the Member State wishes to use the reference rate as a proxy' that the Commission may use the latter method, based on the 'reference rate'. In

particular, the use of the imperative 'should be calculated', in the second sentence of the second paragraph of that point, indicates that the Commission circumscribed its discretion in the choice of the method used to determine and quantify the aid element of a measure, so that, where it is impossible to apply the first method, it must use the second method if there is a market interest rate, and that, therefore, it may use the reference rate only if there is no market interest rate.

70 Fourthly, the argument that the General Court erred in finding that the use of the reference rate, as such, entails a failure on the part of the Commission to fulfil its obligation to carry out an overall assessment, taking into account all relevant evidence in the case enabling it to determine whether Valencia CF would not have obtained comparable facilities from a private operator, is based on a misreading of the judgment under appeal.

71 It is unequivocally clear from paragraph 134 of the judgment under appeal that the General Court's conclusion that the Commission had failed to fulfil that obligation derives exclusively from the General Court's finding, in the same paragraph of the judgment under appeal, that 'the Commission, in presuming that no financial establishment would act as a guarantor for a firm in difficulty and therefore that no corresponding guarantee premium benchmark could be found on the market, disregarded the Guarantee Notice by which it is bound'. There is nothing in that paragraph to suggest that, by that statement, the General Court considered that the use of the reference rate, as such, entails a failure to comply with that obligation.

72 Fifthly, given that, in the analysis carried out in paragraphs 132 to 134 of the judgment under appeal, the General Court confined itself to verifying whether the Commission had carried out its assessment in accordance with the requirements which it had imposed on itself by the adoption of the Guarantee Notice, that institution's claim that the General Court itself infringed the requirements relating to the required overall assessment cannot succeed.

73 In the fourth place, as regards the limits of the burden of proof and the Commission's duty of care, it must be borne in mind that, in view of the objective pursued by Article 107(1) TFEU of ensuring undistorted competition, including between public undertakings and private undertakings, the concept of 'aid', within the meaning of that provision, cannot cover a measure granted to an undertaking through State resources where that undertaking could have obtained the same advantage in circumstances which correspond to normal market conditions. The assessment of the conditions under which such an advantage was granted is made, in principle, by applying the private operator principle (judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 105 and the case-law cited).

74 Therefore, when the private operator principle applies, it is one of the factors that the Commission is required to take into account for the purposes of establishing the existence of aid and is not, therefore, an exception that applies only if a Member State so requests, when it has been found that the constituent elements of 'State aid', as laid down in Article 107(1) TFEU, exist (judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 107 and the case-law cited).

75 In that case, it is therefore the Commission that has the burden of proving, taking into account, inter alia, the information provided by the Member State concerned, that the conditions for the application of the private operator principle have not been satisfied, so that the State intervention at issue entails an advantage within the meaning of Article 107(1) TFEU (judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 108 and the case-law cited).

76 In that context, it is for the Commission to carry out an overall assessment, taking into account all relevant evidence in the case enabling it to determine whether the recipient company would manifestly not have obtained comparable facilities from such a private operator (judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 110 and the case-law cited).

77 In that regard, all information liable to have a significant influence on the decision-making process of a normally prudent and diligent private operator, in a situation as close as possible to that of the public operator, must be regarded as being relevant (judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 112 and the case-law cited).

78 In addition, the Commission is required, in the interests of sound administration of the fundamental rules of the TFEU relating to State aid, to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose (judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 114 and the case-law cited).

79 The Commission cannot assume that an undertaking has benefited from an advantage constituting State aid solely on the basis of a negative presumption, based on a lack of information enabling the contrary to be found, if there is no other evidence capable of positively establishing the actual existence of such an advantage (judgment of 10 December 2020, *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 111 and the case-law cited).

80 Therefore, when it appears that the private operator principle could be applicable, the Commission is under a duty to ask the Member State concerned to provide it with all relevant information enabling it to determine whether the conditions governing the applicability and the application of that principle are met (judgment of 10 December 2020, *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 104 and the case-law cited).

81 Since the Commission does not have direct knowledge of the circumstances in which an investment decision was taken, it must rely, for the purposes of applying that principle, to a large extent, on the objective and verifiable evidence produced by the Member State at issue (judgment of 10 December 2020, *Comune di Milano* v *Commission*, C-160/19 P, EU:C:2020:1012, paragraph 112).

82 Even where that institution is faced with a Member State which does not fulfil its duty to cooperate and has not provided the Commission with the information requested, it must base its decisions on reliable and coherent evidence which provides a sufficient basis for concluding that an undertaking has benefited from an advantage amounting to State aid and which, therefore, supports the conclusions which it arrives at (judgment of 26 March 2020, *Larko* v *Commission*, C-244/18 P, EU:C:2020:238, paragraph 69 and the case-law cited).

83 It follows that, when the existence and legality of State aid is being examined, it may be necessary for the Commission, where appropriate, to go beyond a mere examination of the facts and points of law brought to its notice (judgment of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraph 45 and the case-law cited).

84 On the other hand, it cannot be inferred from that case-law that it is for the Commission, on its own initiative and in the absence of any evidence to that effect, to seek all information which might be connected with the case before it, even where such information is in the public domain (judgment of 2 September 2021, *Commission* v *Tempus Energy and Tempus Energy Technology*, C-57/19 P, EU:C:2021:663, paragraph 45 and the case-law cited).

85 Consequently, the lawfulness of a decision concerning State aid falls to be assessed by the EU judicature in the light of the information available to the Commission on the date when the decision was adopted, which includes information that seemed relevant to the assessment to be carried out in accordance with the case-law referred to in paragraphs 75 and 76 above and which could have been obtained, upon request by the Commission, during the administrative procedure (judgment of 11 November 2021, *Autostrada Wielkopolska* v *Commission and Poland*, C-933/19 P, EU:C:2021:905, paragraph 118 and the case-law cited).

86 In the present case, it follows from paragraphs 132 to 135 and 137 of the judgment under appeal that the General Court, first, considered that the Commission had imposed on itself, by adopting the Guarantee Notice, the obligation to verify whether there was a 'corresponding guarantee premium benchmark that can be found on the financial markets' or 'a market price for a similar non-guaranteed loan' before resorting to the reference rate. Secondly, it considered that the Commission failed to fulfil that obligation, in that the finding that no corresponding guarantee premium benchmark could be found on the financial markets is the result of a failure to comply with that notice and that the finding that there was no market price for a similar non-guaranteed loan is not substantiated to the requisite legal standard.

87 In that regard, first, it follows from the findings made in paragraphs 64 to 68 above that the General Court was right to hold that, by adopting that notice, the Commission imposed on itself the obligation to verify whether 'there is' a corresponding guarantee premium benchmark available on the financial markets and, failing that, whether 'there is' a market price for a similar non-guaranteed loan, before resorting to the reference rate.

88 Secondly, as the General Court stated in particular in paragraphs 124 to 126 of the judgment under appeal, there is nothing in the decision at issue to suggest that the Commission verified whether there was a corresponding guarantee premium benchmark available on the financial markets. It merely stated, in recital 86(c) of that decision, that 'the annual guarantee premiums of 0.5%-1% charged for the guarantees in question cannot be considered as reflecting the risk of default for the guaranteed loans, given the difficulties of Valencia CF'. In addition, in Section 7.2 of the decision at issue, relating to the quantification of the aid, the Commission commenced its examination in recital 93 directly with the second stage, consisting of verifying whether there is a market price for a similar non-guaranteed loan.

89 The only explanation which emerges from the decision at issue regarding that approach is that the Commission considered that, for a firm in difficulty, there is no corresponding guarantee premium benchmark available on the financial markets.

90 However, as the General Court stated, in paragraphs 127 and 133 of the judgment under appeal, such logic runs counter to the Guarantee Notice which drew a distinction, in point 4.1(a), 'for companies in difficulty', between cases where 'a market guarantor, if any, would … charge a high premium given the expected rate of default' and those where, if 'the likelihood that the borrower will not be able to repay the loan becomes particularly high, this market rate may not exist'.

91 It follows that, in accordance with that notice, the assessment that Valencia CF was in difficulty at the time measure 1 was granted is not in itself sufficient to establish that there is no corresponding guarantee premium benchmark available on the financial markets, since such a finding requires, at the very least, an additional analysis of the expected risk of default.

92 In that regard, the General Court also noted, in paragraph 128 of the judgment under appeal, that the Commission drew a distinction, in particular in recitals 77 and 80 of the decision at issue, between different types of difficulties and considered that, although Valencia CF was, at the time that measure was granted, in difficulty, within the meaning of the 2004 Rescue and Restructuring Guidelines, it was not 'in a situation of severe crisis' for the purposes of point 4.1(a) of the Guarantee Notice. It follows that the General Court was entitled to find that the Commission had not established in the decision at issue that the likelihood that Valencia CF could not repay the loan was 'particularly high' within the meaning of point 4.1(a) of that notice.

93 Thus, the General Court did not err in law in holding that the Commission failed to fulfil its obligation to take into account all relevant evidence in the case and that, contrary to what the Commission claims, the General Court did not extend the duty of care incumbent on that institution beyond the limits of what it imposed on itself when it adopted the Guarantee Notice.

94 Thirdly, as the General Court found, in paragraphs 131, 135 and 137 of the judgment under appeal, there is nothing in the decision at issue and nothing produced before the General Court which supports the Commission's assertion in recital 93 of the decision at issue that it is 'due to the limited number of observations of similar transactions on the market' that the reference value of the market price for a similar non-guaranteed loan 'will not provide a meaningful comparison'.

95 In that regard, as the Advocate General observed, in points 79 and 80 of his Opinion, the Commission inferred from its own finding that Valencia CF was in difficulty when measure 1 was granted, not only that no financial institution would have provided that club with a guarantee, but also that no similar non-guaranteed loan could exist.

96 Since the existence of both a corresponding guarantee premium benchmark available on the financial markets and a market price for a similar non-guaranteed loan which may be decisive, in accordance with the Guarantee Notice, for the purpose of establishing the existence of State aid and for its quantification, those are factors that are eminently relevant to the assessment to be carried out by the Commission for the purposes of the case-law referred to in paragraphs 75 and 76 above.

97 Although the Commission, by expressing, in paragraph 28 of the decision to initiate the formal investigation procedure, its doubts as to the willingness of financial institutions to grant a similar loan to Valencia CF without a State guarantee, has satisfied its obligation referred to in paragraph 80 above to ask the Member State concerned for the relevant information in that regard, it is common ground that it received no reply from the Spanish authorities nor did it refer, before the General Court, to any other information which it might have had at its disposal when the decision at issue was adopted.

98 In those circumstances, it appears that the Commission has not established before the General Court that it had evidence of a certain reliability and consistency, for the purposes of the case-law referred to in paragraph 82 above, which would have enabled it to state that there was

only a 'limited number of observations of similar transactions on the market' which do 'not provide a meaningful comparison' with the reference value of the market price for a similar non-guaranteed loan.

99 As is apparent from paragraph 52 above, the Commission itself considers that it may be required to use its specific powers of investigation, in particular where it does not have sufficient evidence to demonstrate the existence of aid or where it is reasonable to suppose that the information at its disposal is incomplete.

100 Since the Commission, by adopting the Guarantee Notice, committed itself to verifying whether there was a market price for a similar non-guaranteed loan, the General Court was entitled to take the view, without erring in law, that that institution was required, in circumstances such as those which emerge from the findings made in paragraphs 93 to 97 above, to go beyond a mere examination of the matters of fact and of law brought to its attention, for the purposes of the case-law referred to in paragraph 82 above, in response to the decision to initiate the formal investigation procedure.

101 Contrary to what the Commission claims, the General Court did not, in that way, impose on it an excessive duty of care and an excessive burden of proof, but merely found that the Commission had not satisfied the requirements which it had imposed on itself by adopting that notice. It did not require the Commission to provide evidence that transactions of a similar nature could not be found on the market, but merely pointed out that the Commission had not substantiated its finding or availed itself of its power, in accordance with the case-law referred to in paragraph 84 above, to make a specific request to the Spanish authorities or the interested parties during the administrative procedure to obtain the production of relevant evidence for the purposes of the assessment to be carried out. In particular, the General Court did not rule out the possibility that it could have been sufficient for the Commission, in order to fulfil its duty of care and satisfy its burden of proof, to make such a specific request in the context of the exchanges referred to in paragraph 14 above.

102 In the light of all the foregoing considerations, the single ground of appeal and, accordingly, the appeal itself must be dismissed as unfounded.

Costs

103 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to costs.

104 Under Article 138(1) of the Rules of Procedure, which applies to the appeal procedure by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

105 Since the Commission has been unsuccessful in its single ground of appeal and Valencia CF has applied for an order for costs, the Commission must be ordered to bear its own costs and to pay those incurred by Valencia CF.

106 In accordance with Article 140(1) of the Rules of Procedure, which applies, *mutatis mutandis*, to appeal proceedings by virtue of Article 184(1) thereof, the Member States which have intervened in the proceedings are to bear their own costs. Consequently, the Kingdom of Spain, having participated in the proceedings before the Court of Justice, must bear its own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by Valencia Club de Fútbol SAD;**

3. **Orders the Kingdom of Spain to bear its own costs.**

[Signatures]